

U.S. COURTS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

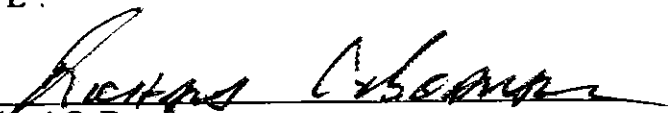
Debtor.

19

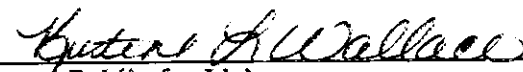
entered on April 18, 1997. A true copy of said Order is appended to this Affidavit as Exhibit "B".

3. A true copy of this Court's Memorandum Decision entered March 18, 1997 on the Debtor's turnover motion is attached hereto as Exhibit "C".

4. A true copy of the Motion for Relief from Automatic Stay and for Set Off filed by The Amalgamated Sugar Company on March 26, 1997 is attached hereto as Exhibit "D". The Notice of Hearing is attached as Exhibit "E".


Richard C. Boardman

SUBSCRIBED and SWORN to before me this 4th day of December, 1998.


Notary Public for Idaho
Residing in Boise Idaho
My Commission Expires: 2/9/99

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 4th day of December, 1998, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the rules of procedure, to the following persons:

Julie Klein Fischer
D. Samuel Johnson
White, Peterson, Pruss, Morrow & Gigray
P.O. Box 247
Nampa, ID 83653-0247

Hand Delivery	_____
U.S. Mail	_____
Facsimile	<u> X </u>
Overnight Mail	_____

Howard R. Foley
Foley & Freeman, Chartered
77 East Idaho Street
P.O. Box 10
Meridian, ID 83680

Hand Delivery	_____
U.S. Mail	<u> X </u>
Facsimile	_____
Overnight Mail	_____

Office of the U.S. Trustee
304 North Eighth Street, Ste. 347
P.O. Box 110
Boise, ID 83701

Hand Delivery	_____
U.S. Mail	<u> X </u>
Facsimile	_____
Overnight Mail	_____

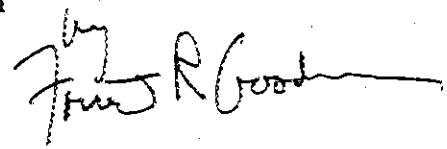
United States Trustee
Ronald D. Schoen
P.O. Box 216
Payette, ID 83661

Hand Delivery	_____
U.S. Mail	<u> X </u>
Facsimile	_____
Overnight Mail	_____

Terry Hipwell
30932 Shelton Road
Parma, ID 83660

Hand Delivery	_____
U.S. Mail	<u> X </u>
Facsimile	_____
Overnight Mail	_____


Richard C. Boardman



U/D
JUL 20 1998
FEDERAL COURT

Terrence R. White
Julie Klein Fischer
WHITE, PETERSON, PRUSS,
MORROW & GIGRAY, P.A.
Attorneys at Law
104 Ninth Avenue South
Post Office Box 247
Nampa, Idaho 83653-0247
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

LAND VIEW FERTILIZER, INC.,
an Idaho corporation,

Plaintiff,

vs.

THE AMALGAMATED SUGAR
COMPANY LLC, a Delaware
limited liability company,

Defendants.

CASE NO. CU 98-02828

COMPLAINT - Breach of Contract

Fee Category: A-1
Filing Fee: \$77.00

COMES NOW, the plaintiff, LAND VIEW FERTILIZER, INC., an Idaho corporation, and for cause of action against the above-named defendant COMPLAINS AND ALLEGES as follows:

I

That at all times herein mentioned, plaintiff was and now is a corporation duly organized and existing under the laws of the State of Idaho, qualified to do business in the State of Idaho, and is transacting business in Canyon County, Idaho.

II

That at all times herein mentioned, defendant was and now is a limited liability company duly organized and existing under the laws of the State of Delaware and is transacting business in Canyon County, Idaho.

III

On or about April 13, 1995, plaintiff and defendant entered into a Security Agreement Covering Farm Products (hereinafter "Contract"), a copy of which is attached hereto as Exhibit "A" and incorporated herein by this reference, with Grower Terry L. Hipwell, (hereinafter "Debtor"). The purpose of the Contract was to perfect the security interest of defendant in crops sown and growing or to be sown or grown by Debtor two years from the date of the Contract on property located in Owyhee County, Idaho, which was leased by Debtor.

IV

In consideration of and in order to induce defendant to loan money to Debtor, plaintiff and defendant executed a Waiver and Subordination Agreement as part of the Contract, subordinating plaintiff's interest to defendant in or to crops grown on the land located in Owyhee County, Idaho, to the extent of \$460.00 per acre.

V

The sale of the crops grown by Debtor on the Owyhee County property exceeded \$460 per acre. However, despite defendants receipt of all such crop proceeds, defendant has failed, neglected and refused to pay to plaintiff the proceeds from the sale thereof in excess of \$460.00 per acre, in violation of the terms of the Contract, which is a valid and binding Contract between all parties thereto.

VI

Defendant's failure to comply with the terms of the Contract by refusing to pay plaintiff is a substantial and material breach of the Contract.

VII

As a direct result of defendant's breach of contract Plaintiff suffered damages in an amount which will be proven at trial, but which exceeds \$25,000.

VIII

Plaintiff is entitled to attorneys fees and costs associated with pursuing this action pursuant to Idaho Code § 12-120(3), and any other applicable state law or rule. Plaintiff also is entitled to interest pursuant to Idaho Code § 28-22-104(1).

WHEREFORE, plaintiff prays for an order and judgment and decree of this Court against the defendant as follows:

1. For a judgment declaring defendant liable to plaintiff for breach of contract, and for a money judgment in an amount in excess of \$25,000 (the exact amount to be proven at trial), plus interest at the rate of twelve percent (12%) from the date said amount was due until the date of Judgment, pursuant to Idaho Code § 28-22-104(1).
2. For attorney fees and costs pursuant to Idaho Code § 12-120(3) and any other applicable law.
3. For statutory interest after Judgment pursuant to Idaho Code § 28-22-104(2).
4. For such other and further relief as the Court deems just and equitable.

DATED this 18th day of May, 1998.

WHITE, PETERSON, PRUSS,
MORROW & GIGRAY, P.A.

By: 

Julie Klein Fischer
Attorneys for Plaintiff

STATE OF IDAHO)
) ss.
County of Canyon)

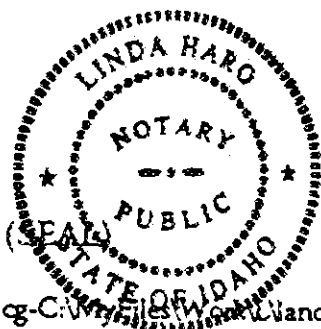
JAY DEE KARREN, being first duly sworn, deposes and says:

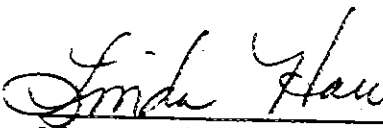
That he has read the foregoing Complaint, knows the contents thereof, and believes the facts therein stated to be true and correct to the best of his knowledge and belief.

DATED this 18th day of May, 1998.


Jay Dee Karren

SUBSCRIBED AND SWORN to before me this 18th day of May, 1998.





Notary Public for Idaho

Commission expires: 2-24-2004

3-95

(Name of Grower) TERRY L. HEPWELL, A SINGLE MAN of
(Address) 30732 SHELTON ROAD (City) PARMA
(County) OWYHEE (State) IDAH
(hereinafter whether singular or plural called "Debtor") hereby grants to the Amalgamated Sugar Company (hereinafter called "Secured Party") a security interest in the collateral hereinafter described to secure payment of all money advanced to Debtor pursuant to Debtor's Loan Agreement(s) with Secured Party. This Security Agreement is subject to the terms and conditions of such Loan Agreement(s). This Security Agreement also secures the payment of any other money loaned by Secured Party to Debtor, now or in the future.

1. Collateral.

- a. Debtor grants to Secured Party a security interest in approximately 475.0 acres of sugarbeets or other crops, now sown and growing or to be sown or grown two years (five years in the State of Oregon) from the date of execution hereof, on the following described real property in OWYHEE County, State of IDAH.

IN THAT PART OF: R2, SEC 12, TWP 35, RG 14WN
R2 NW4, SEC 20, TWP 35, RG 14WN
NW4, SEC 10, TWP 35, RG 14WN

- b. The name of the record owner of said real property is HULET MANAGEMENT COMPANY.
- c. Debtor also grants to Secured Party a security interest in all products and proceeds of the foregoing crops, including, but not limited to cash; contract rights, including insurance proceeds private or governmental; accounts receivable; and government disaster or similar payments.

2. Warranties. Debtor hereby warrants and covenants:

- a. Debtor is now the owner of the Collateral free from any adverse lien, security interest, or encumbrance and that no financing statement pertaining to any portion of the Collateral is on file in any public office, except as set forth below:

PMI 04-05-95

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- b. The Collateral shall not be removed from the above real property without the prior written consent of Secured Party, except for the sale of the Collateral to Secured Party.
- c. Debtor shall keep the Collateral in good condition. Debtor shall not waste or destroy the Collateral or any part thereof, and shall plant, cultivate, and harvest the crops in a good and farmerlike manner.
- d. Debtor agrees to execute and file financing statements and do whatever may be necessary under applicable law to perfect and continue Secured Party's security interest.
3. Sale of Collateral Prohibited. It is understood between the parties that the Collateral consisting of sugarbeets is to be sold only to Secured Party. Sale of the crop of sugarbeets, or any other crop from the above described real property, to any other person, firm, or corporation is expressly prohibited without the written consent of Secured Party and upon terms and conditions approved by Secured Party.
4. Payment of Expenses by Secured Party. Debtor shall promptly pay any and all taxes, liens, or other expenses or obligations relating to the Collateral. If any such tax, lien, or other expense or obligation relating to the Collateral is not paid by Debtor promptly when due, Secured Party, at its option, may pay any such indebtedness. Debtor shall promptly reimburse Secured Party on demand for any such payments.
5. Defaults. Debtor shall be in default under this Security Agreement on the happening of any one of the following events or conditions or any combination thereof:
- a. Failure to make any payment or perform any obligation under Debtor's Loan Agreement with Secured Party, including the exercise by Secured Party of its right to refuse any cash advance because the Collateral does not justify such advance.
- b. The falsity in any material respect of any warranty, representation, or statement made or furnished to Secured Party in connection with Debtor's Loan Agreement with Secured Party or this Security Agreement;
- c. Any event which results in the acceleration of the maturity of the indebtedness of Debtor to others under any agreement or understanding;
- d. The damage, destruction, sale, or encumbrance of any of the Collateral, or the making of any levy on or seizure or attachment of, the Collateral;

EXHIBIT A

1. The failure of Debtor as determined by Secured Party in its sole judgment, to plant or cultivate the crops referred to herein, in due season, and in a good and farmerlike manner, or to properly care for or protect any Collateral;
2. The failure of Debtor to harvest the crops referred to herein in a timely manner. In the event Secured Party in its sole judgment, determines that the Collateral is subject to possible loss or reduction if not harvested within a certain period, the failure of Debtor to so harvest shall be a default.
6. **Remedies.** All obligations secured hereby shall be immediately due and payable upon default hereunder, and Secured Party shall have all of the remedies under the Uniform Commercial Code, or other applicable law, of the State where the above real property is located, including:
- Upon demand, Debtor shall give possession of the Collateral to Secured Party and assemble the Collateral at a reasonably convenient place. Secured Party is authorized to enter any premises where the Collateral is located and to take such actions, including cultivating and harvesting, as necessary, to protect the Collateral;
 - Debtor hereby agrees that a period of five (5) days from the time notice is sent, by first-class mail or otherwise, shall be a reasonable period of notification of a sale or other disposition of the Collateral;
 - Debtor agrees to pay all expenses incurred by Secured Party in protecting the Collateral and in cultivating, harvesting, rebaling, holding, preparing for sale, selling, and other expenses reasonably incurred in enforcing any remedy available to Secured Party, including reasonable attorney's fees and other legal expenses of Secured Party, and payment of all said sums shall be secured hereby;
 - After any disposition of the Collateral, Debtor agrees to pay any deficiency remaining after application of the net proceeds to any indebtedness secured hereby;
 - Secured Party shall have the right immediately and without further action by it, to setoff against the obligations of Debtor all money owed by Secured Party in any capacity to Debtor, whether or not due, and Secured Party shall be deemed to have exercised such right of setoff and to have made a charge against any such money immediately upon occurrence of such default even though such charge is made or entered on the books of Secured Party subsequent thereto.
7. **Successors.** This Agreement shall be binding upon the successors, heirs, assigns, and representative of the parties hereto.

IN WITNESS WHEREOF, Debtor has caused this Security Agreement to be executed the day and year first written above.

X TERRY L. TRIVELL DEBTOR THE AMALGAMATED SUGAR COMPANY
 DEBTOR By: [Signature]

WAIVER AND SUBORDINATION AGREEMENT

Debtor, named in the foregoing Security Agreement has sought a loan to enable the production of a crop on certain real property (the "land") described in said Agreement and The Amalgamated Sugar Company ("Amalgamated") has agreed to make said loan upon certain terms and conditions.

The undersigned claims an interest, legal or equitable, in the crop on the land, whether as owner, mortgagee, trust deed beneficiary, prior mortgagee, sharecropper, landlord, lienor, land sales contract, or any interest of any kind or character.

In consideration of and in order to induce Amalgamated to loan money to Debtor, the undersigned hereby subordinates and waives any and all rights, claims, liens, or interest which the undersigned now have or may hereafter acquire, in any manner whatsoever, in or to the said crop or other crop grown on the land, and the proceeds from the sale thereof, to the extent of \$ 166.00 per acre, plus interest, plus any expenses incurred by Amalgamated in growing, cultivating, harvesting, and delivering the Collateral as provided below, which is the interest of Amalgamated in the Collateral and specifically agrees that enforcement of any and all rights of the undersigned shall be deferred until such time as Amalgamated's interest is fully paid, satisfied, and discharged.

The undersigned consents to Amalgamated exercising its remedies under the foregoing Security Agreement upon default of Debtor, including, but not limited to growing, cultivating, harvesting and delivering the Collateral and in incurring expenses related thereto.

Signed	Date
X <u>[Signature]</u> <u>AMALGAMATED SUGAR COMPANY</u>	X <u>4/13/95</u>
X <u>[Signature]</u> <u>DEBTOR</u>	X <u>4/17/95</u>
X <u>[Signature]</u> <u>LAND FERTILIZER</u>	

CASH LEASE WAIVER

The undersigned has leased the real property described in the foregoing Security Agreement to Debtor for a cash rental and claims no interest, legal or equitable, in the crop on said land. The undersigned further claims no interest in Amalgamated's sugarbeet payments to Debtor and agrees such payment may be made solely to Debtor.

Signed: [Signature] By [Signature] Date: Apr. 14, 95

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In re:

HIPWELL, TERRY,

Debtor.

Case No. 96-02095

ORDER FOR RELIEF FROM
AUTOMATIC STAY AND
APPROVING SETOFF

The Amalgamated Sugar Company's (TASCO) motion pursuant to 11 U.S.C. § 362(d) and L.B.R. 4001.2 for relief from the automatic stay having come before this Court, and good cause appearing therefrom;

IT IS HEREBY ORDERED that the automatic stay is lifted for the purpose of allowing TASCO to setoff its obligation to Debtor in the sum of \$25,293.24 against the Debtor's obligation to TASCO as set forth in the Proof of Claim filed by TASCO. The basis for this relief was addressed by the Court in its Memorandum of Decision filed March 18, 1997.

DATED this 18 day of April, 1997.

Jim D. Pappas
HONORABLE JIM D. PAPPAS
Chief U.S. Bankruptcy Judge

EXHIBIT 3

ORDER FOR RELIEF FROM AUTOMATIC AND APPROVING SETOFF

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)
) Case No. 96-02095
TERRY HIPWELL,)
)
Debtor.)
)
)
)

Howard R. Foley, FOLEY & FREEMAN, Meridian, Idaho,
for Debtor.

Richard C. Boardman, PENLAND MUNTHER BOARDMAN,
CHARTERED, Boise, Idaho, for The Amalgamated Sugar
Company.

Ronald D. Schoen, Payette, Idaho, Chapter 12
Trustee.

Background.

Before the Court for decision is a Motion for
Turnover and Objection to Claim filed by the Chapter 12
Debtor Terry Hipwell directed against the creditor The
Amalgamated Sugar Company. The matter came on for hearing
before the Court on March 3, 1997. At the conclusion of the
hearing, the Court took the matters under advisement.

MEMORANDUM OF DECISION - 1

EXHIBIT C

Facts.

Debtor grew sugar beets on farm land located in Owyhee and Payette County. In 1994 and 1995, Debtor's sugar beet operations were financed by The Amalgamated Sugar Company ("TASCO"). Separate financing agreements between Debtor and TASCO, consisting of a Loan Agreement and Disclosure Statement, Security Agreement, and Memorandum of Agreement, were executed to cover each of the Payette and Owyhee County farms. These agreements governed the parties' relationship, including crop financing, product delivery, calculation and disbursement of crop proceeds, defaults, and remedies. Where appropriate, these agreements are referred to herein as the Payette County Agreements and the Owyhee County Agreements.

Under both agreements, TASCO was to make advancements, consisting of beet seed or money, to be used by Debtor in the production of his sugar beet crop. At harvest, the beets are sold and delivered to TASCO at its receiving station. If upon sale a beet crop generated a net gain, meaning that the amount of crop sale proceeds exceeded advancements, TASCO was to pay out that excess to Debtor over the course of the following year in agreed install-

ments. In effect, then, the amounts advanced by TASCO to Debtor to produce a crop constituted part payment for the beets grown and sold to TASCO. The amount of an installment payment is determined, in part, by the quality and quantity of the grower's beets, and the current market price of beet sugar.¹ The dates of payment of the deferred installments is also dictated by the agreements.

If, on the other hand, the harvested crop generates a net loss, meaning the amount advanced exceeds the crop sale proceeds, Debtor becomes indebted to TASCO for such loss. Upon Debtor's default in payment of a deficiency, the agreements give TASCO the right to setoff any amounts owing to Debtor against Debtor's indebtedness to TASCO.²

¹ TASCO processes beets throughout the year in order to regulate supply and, thereby, stabilize the price of beet sugar. This benefits both TASCO and the contract growers. Because the beets are processed throughout the year, installment payments are calculated at the time of disbursement using the current market price of beet sugar at the time of payment.

² In the agreements, Debtor also grants TASCO a security interest in his crops and proceeds to secure payment of any balance due to TASCO for advancements.

The 1994 Payette County operation, financed in part by TASCOC advancements, resulted in a net loss. The 1994 loss of \$63,397.70 was rolled, or carried over, into the 1995 Payette County agreements. In 1995, Debtor's Payette County farm again produced a net loss. At the end of the 1995 growing season, Debtor's accumulated total net loss on the Payette County farm for unreimbursed advancements was approximately \$105,867.62.³ Under the 1995 Payette County Agreements, Debtor was indebted to TASCOC for that amount.

In 1995, Debtor's Owyhee County operation produced a net gain. Under the Owyhee County Agreements, then, TASCOC issued a series of installment payments to Debtor in early and mid 1996. TASCOC was scheduled to distribute a final installment payment to Debtor of \$25,293.24 on the 1995 Owyhee County crop in October, 1996. On August 23, 1996, prior to the receipt of the final installment payment, Debtor filed for Chapter 12 relief.

³ See Growers Accounting Statement attached as Exhibit B to Debtor's Memorandum in Support of Motion for Turnover filed February 27, 1997. The total amount due on this agreement from Debtor to TASCOC is in dispute. In this decision, the Court is not issuing binding findings on the amount of such indebtedness.

On September 24, 1996, TASC0 filed a proof of claim in the amount of \$105,561.09 in Debtor's bankruptcy proceeding. TASC0's claim arises out of several other agreements between the parties, unrelated to the Payette and Owyhee County Agreements, entered into in 1994, 1995, and 1996. According to the documents submitted with the proof of claim, TASC0 has a perfected security interest in Debtor's equipment and several vehicles.

On October 25, 1996, after Debtor filed his bankruptcy petition, TASC0 issued to Debtor a Growers Accounting Statement for the Payette County property on which Debtor had suffered the net loss.⁴ As evidenced by the statement, TASC0 had applied \$8,788.01 in beet proceeds against the indebtedness, thereby arriving at the \$105,867.62 figure. The proceeds were derived from the 1995 Payette County beet crop.

On February 18, 1997, Debtor filed the present Motion for Turnover and Objection to Claim. Debtor argues that the final deferred payment under the Owyhee County Agreements, and the Payette County beet proceeds applied

⁴ See supra note 3 and accompanying text.

against the Payette County indebtedness, are property of the bankruptcy estate and recoverable under Section 542. In addition, Debtor challenges the amount due as stated in the proof of claim. TASCOCO opposes the motion and objection. TASCOCO claims that Debtor is not entitled to the funds at issue because under the terms of the Payette and Owyhee agreements, and the facts of this case, it has an enforceable right to setoff the amounts due to Debtor under the Owyhee County Agreements against Debtor's other indebtedness to TASCOCO pursuant to Bankruptcy Code Section 553. In addition, TASCOCO contends that it was entitled to apply the Payette County best proceeds against the Payette County indebtedness under the equitable doctrine of recoupment. Debtor contends that neither defense is available to TASCOCO under these facts.

Discussion.

Section 542 of the Bankruptcy Code, governing turnover of property to the bankruptcy estate, requires creditors to pay to the trustee or debtor-in-possession any

debt that is property of the estate and that is matured, payable on demand, or payable on order . . . except to the extent that such

debt may be offset under section 553 of this title against a claim against the debtor.

11 U.S.C. § 542(b). Section 553, in turn, sets forth a general rule, with certain exceptions not applicable here, that

this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case. . . .

11 U.S.C. § 553(a).

Section 553 does not by itself create a right to setoff (also called "offset"). Instead, it merely acknowledges the continuing vitality of the right to offset mutual prepetition debts in a bankruptcy case to the extent such would be allowed under nonbankruptcy law. In re *Harmon*, 188 B.R. 421 (9th Cir. B.A.P. 1995). In order to invoke Section 553, a right to setoff must exist under nonbankruptcy law, and the debts sought to be offset must be mutual prepetition obligations arising from different transactions. *Citizens Bank of Maryland v. Strumpf*, ___ U.S. ___, 116 S.Ct. 286 (1995); *Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392 (9th Cir. 1996); In re *EAL*,

Inc., 196 B.R. 159 (9th Cir. B.A.P. 1996); *In re Club Wholesale Concepts, Inc.*, 94 I.B.C.R. 213, 216. The burden of proving an enforceable right of setoff rests with the party asserting that right, here TASCOS. *Newbery Corp.*, 95 F.3d at 1399.

In this case, the source of TASCOS's nonbankruptcy right to setoff is the agreements entered into by the parties. The Payette and Owyhee County Agreements each contain the following provision:

6. Remedies. All obligations secured hereby shall be immediately due and payable upon default hereunder, and Secured Party [TASCOS] shall have all of the remedies under the Uniform Commercial Code, or other applicable law, of the State where the above real property is located, including:

e. Secured Party [TASCOS] shall have the right immediately and without further action by it, to setoff against the obligations of Debtor all money owed by Secured Party [TASCOS] in any capacity to Debtor, whether or not due, and Secured Party [TASCOS] shall be deemed to have exercised such right of setoff and to have made a charge against any such money immediately upon occurrence of such default even though such charge is made or entered on the books of Secured Party [TASCOS] subsequent thereto.⁵

⁵ See Security Agreement dated April 13, 1995, relating to the Owyhee County property, and Security

The agreements permit TASCOCO to withhold the installment payment due under the Owyhee County Agreements and apply it against Debtor's indebtedness under the Payette County Agreements upon Debtor's default. Here, Debtor defaulted upon his failure to produce and deliver a sufficient crop on the Payette County property to generate proceeds from which to satisfy the advancements from TASCOCO. Thus, under the agreements, TASCOCO has the contractual right to setoff amounts it owes Debtor under the Owyhee County Agreements against Debtor's obligations to TASCOCO under the Payette County Agreements.

The next requirement under Section 553(a) is that the debts sought to be offset must be "mutual." For purposes of Section 553, mutuality is satisfied when the "parties [] have full and concurrent rights against each other." E.g., *In re Lares*, 95 I.B.C.R. 264, 265-66 (citations omitted). In other words, mutuality of obligations requires simply that "something must be owed by both sides." *Id.* at 266. In this case, the parties

Agreement dated March 28, 1995, relating to the Payette County property, attached as Exhibits D and E, respectively, to Debtor's Memorandum in Support of Motion for Turnover filed February 27, 1997.

obligations are mutual. Debtor is indebted to TASC0 under the Payette County Agreements, and TASC0 is obligated to Debtor under the Owyhee County Agreements.

The final requirement under Section 553 is that the mutual obligations arose prepetition. Debtor does not dispute that its obligation to TASC0 under the Payette County Agreements arose prepetition. Debtor contends, however, that TASC0's obligation under the Owyhee County Agreements arose after bankruptcy. Debtor reasons that, although the contracts were executed and the sugar beets delivered prepetition, the amount owing to Debtor under the final installment payment could not be, and in fact was not, ascertained or calculated until after the bankruptcy filing.

For setoff purposes, a debt that is contingent and unliquidated at the time of the bankruptcy filing will nonetheless be deemed to have arisen prepetition if the right to payment arose before the filing. See *Newbery Corp.*, 95 F.3d at 1398 (stating that claim may be set off without regard to whether it is contingent or unliquidated); *In re Claar*, 93 I.B.C.R. 104, 104-105 (concluding that even though debt was contingent and unliquidated it existed prepetition and therefore complied with the requirements of

Section 553). Therefore, the crucial date is that on which the right to payment arose. When parties enter into a contract prior to bankruptcy, any future right to payment accrues at the time of contracting, even though the establishment or determination of the amount owed under the contract occurs postpetition. See, e.g., *In re Claar*, 93 I.B.C.R. at 104-105; *United States v. Gerth*, 991 F.2d 1428, 1433-34 (8th Cir. 1993); *In re Women's Technical Institute, Inc.*, 200 B.R. 77, 83-84 (Bankr. D. Mass. 1996). In other words, a claim is not transformed from a prepetition claim to a post-petition claim simply because it can not be computed until after the petition is filed. *In re United Sciences of Am., Inc.*, 893 F.2d 720, 724 (5th Cir. 1990).

TASCO's claim against Debtor stems from the agreements between the parties entered into some 16 months before the bankruptcy filing. An obligation for payment accrued at the time the parties executed the agreements in which Debtor promised to pay TASCO for any net loss. So, too, did TASCO's obligation to pay Debtor any excess crop proceeds arise at the contract's inception. Accordingly, even though the amount of the final installment payment from

TASCO to Debtor was necessarily computed after Debtor filed for relief, the right to receive such payment existed prepetition. Thus, the requirements of Section 553 that both debts arise before the commencement of the bankruptcy case is satisfied.

TASCO is entitled to offset the final installment payment due to Debtor under the Owyhee County Agreements against Debtor indebtedness under the Payette County Agreements. Although Section 553 preserves TASCO's right to setoff in bankruptcy, under the statute such right is subject to the Section 362(a)(7) automatic stay. However, from the evidence it appears that TASCO has not effected a setoff, nor violated the automatic stay, by withholding payment of the final installment. *Citizens Bank of Maryland v. Strumpf*, ___U.S. ___, ___, 116 S.Ct. 286, 289 (1995). However, under *Strumpf*, TASCO is admonished to formally request relief from the stay promptly in order to exercise its right to setoff.

TASCO's application of the \$8,788.01 in beet proceeds from the Payette County farm against Debtor's indebtedness on that operation does not fall within the

purview of Section 553, however.⁶ One of the defining characteristics of setoff is that "the mutual debt and claim . . . are those arising from different transactions."

Newbery Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392, 1398 (9th Cir. 1996). In this case, both obligations, Debtor's liability for the advancements and TASCOCO obligation to distribute the net proceeds, arose out of a single integrated transaction: the Payette County operation and the underlying Agreements. Thus, the Court finds that the matter falls outside the ambit of Section 553.

Notwithstanding the inapplicability of Section 553, however, TASCOCO was entitled to deduct the proceeds from Debtor's indebtedness on the operation. TASCOCO contends that the application of the crop proceeds against the advancements on the Payette County farm is founded in the equitable doctrine of recoupment. However, the Court concludes that although the recoupment doctrine would apply to defend against Debtor's claim to the proceeds as

⁶ As noted above, after Debtor filed his bankruptcy petition, TASCOCO issued to Debtor a Growers Accounting Statement for the Payette County property on which Debtor had suffered the net loss. As evidenced by the statement, TASCOCO had already applied \$8,788.01 in beet proceeds against the indebtedness.

discussed below, the issue is controlled by the parties' express agreements on the Payette County operation.

Under the provisions of the Payette County Agreements, TASC0 was obligated to distribute the crop proceeds only to the extent that the 1995 crop proceeds exceeded advancements. Likewise, Debtor was indebted to TASC0 only to the extent that the advancements exceeded crop proceeds. Obviously, the parties were required to reconcile the account on the Payette County property in order to come to proper determination of the amount due, by either party, on the operation.⁷

In this case, crop proceeds fall short of advancements. Under the Agreements, then, TASC0 was entitled to deduct the \$8,788.01 from the advancements to reduce Debtor's indebtedness to TASC0. This allows the parties to come to a proper determination of the amounts due and owing on the Payette County operation. While it is true that some portion of the shortfall results from the dismal results of the 1994 season on the Payette County farm, such

⁷ See Memorandum of Agreements, Security Agreements, and Loan Agreement and Disclosure Statements attached as Exhibits D and E to Debtor's Memorandum in Support of Motion for Turnover filed February 27, 1997.

does not alter the outcome because Debtor specifically agreed to add the 1994 debt to the 1995 contract.

The same result would be reached under the doctrine of recoupment. In contrast to setoff, recoupment involves the netting out of debt arising from a single transaction. The debt may arise either before or after the commencement of the case. In *re Harmon*, 188 B.R. 421, 425 (9th Cir. B.A.P. 1995). In addition, unlike setoff, recoupment is not subject to the automatic stay. *Newberry Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1399 (9th Cir. 1996). Further, because recoupment only abates or reduces a debt, as opposed to constituting an independent basis for a debt, it is not a claim in bankruptcy. In *re Harmon*, 188 B.R. at 425. Justification for the recoupment doctrine is that when the creditor's claim against the debtor arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim against the creditor rather than a mutual obligation.

Here, TASC0 advanced funds to Debtor under the Payette County Agreements to be used in the production of his Payette County sugar beet crop. Debtor's claim against

MEMORANDUM OF DECISION - 15

TASCO arose after delivery of the 1995 crop to TASCO's receiving station. However, Debtor was liable to TASCO for the advancements, and such advancements greatly exceeded crop proceeds. The doctrine of recoupment, as applied here, would insure that Debtor is only allowed to recover those amounts just and properly due. Thus, the doctrine would also apply to defend against Debtor's claim to the \$8,788.01.

Issues Not Resolved by this Decision.

There are several potential issues discussed by the parties in their pleadings and at the hearing on Debtor's Motion and Objection that are not finally resolved by this decision.

First, as noted above, the Court makes no final finding concerning the accuracy of the total amount claimed to be due from Debtor to TASCO as stated in its proof of claim. If Debtor, the Trustee, or other interested parties intend to formally dispute the amount claimed to be due, they may file a supplemental objection to TASCO's proof of claim on that basis.

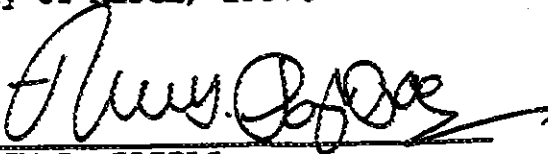
Next, the Court does not here finally determine the extent or amount of TASCO's allowed secured claim. TASCO claims a security interest in crops, but there is some question whether that security interest was properly perfected. Moreover, the Court makes no findings as to the value of any other collateral, such as equipment, TASCO contends secures its claim. These matters must also be addressed separately, or possibly, in connection with confirmation of Debtor's proposed plan.

Finally, the Court was informed that TASCO and Landview Fertilizer entered into certain subordination or similar agreements regarding the parties' respective rights in Debtor's crops. Any disputes arising from those agreements are likewise matters saved for another day.

Conclusion.

Counsel for TASCO may submit an appropriate form of order denying Debtor's Motion for Turnover and Objection to Claim as the same relates to the proceeds from the Payette and Owyhee County beet crops.

DATED This 18th day of March, 1997.

A handwritten signature in dark ink, appearing to read "Jim D. Pappas", written over a horizontal line.

JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

MEMORANDUM OF DECISION - 18

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

Office of the U.S. Trustee
P. O. Box 110
Boise, Idaho 83701

Howard R. Foley, Esq.
FOLEY & FREEMAN
P. O. Box 10
Meridian, Idaho 83680

Ramona S. Neal, Esq.
GIVENS PURSLEY & HUNTLEY
P. O. Box 2720
Boise, Idaho 83701

Richard C. Boardman, Esq.
PENLAND MUNTHE BOARDMAN CHARTERED
P. O. Box 199
Boise, Idaho 83701

John D. Harrington, Esq.
WHITE, PETERSON, PRUSS, MORROW & GIGRAY
P. O. Box 247
Nampa, Idaho 83653

Ronald D. Schoen
P. O. Box 216
Payette, Idaho 83611

CASE NO.: 96-02095

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED: 3/18/97

By *Ma Anne Titus*
Deputy Clerk

MEMORANDUM OF DECISION - 19

Richard C. Boardman
PENLAND MUNTHNER BOARDMAN, CHARTERED
Jefferson Place
350 N. 9th Street, Suite 500
P.O. Box 199
Boise, Idaho 83701
Telephone: (208) 344-4566
File No. 30-3333.59

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CLERK CAMERON BURKE
IDAHO

Attorneys for The Amalgamated Sugar Company

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In re:

HIPWELL, TERRY.

Debtor.

Case No. 96-02095

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND FOR
SET OFF

The Amalgamated Sugar Company (TASCO) by and through its counsel of record, Penland, Munther, Boardman, Chartered, hereby moves, pursuant to 11 U.S.C. § 362(d) for relief from the automatic stay and for set off. The amount to be set off is \$25,293.24. This motion is brought in accordance with the direction of the Court contained in its Memorandum Decision dated March 18, 1997 and for the reasons and on the grounds set forth therein.

DATED this 26 day of March, 1997.

PENLAND MUNTHNER BOARDMAN, CHARTERED

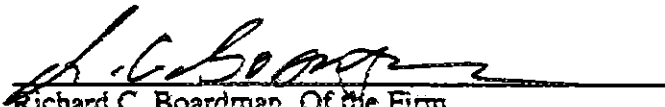

Richard C. Boardman, Of the Firm
Attorneys for The Amalgamated Sugar Company

EXHIBIT D

MOTION FOR RELIEF FROM AUTOMATIC STAY AND FOR SET OFF - 1

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 26 day of March, 1997, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the rules of procedure, to the following persons:

Howard R. Foley
Foley & Freeman, Chartered
77 East Idaho Street
P.O. Box 10
Meridian, ID 83680

Hand Delivery
U.S. Mail X
Facsimile
Overnight Mail

Office of the U.S. Trustee
304 North Eighth Street, Ste. 347
P.O. Box 110
Boise, ID 83701

Hand Delivery
U.S. Mail X
Facsimile
Overnight Mail

United States Trustee
Ronald D. Schoen
P.O. Box 216
Payette, ID 83661

Hand Delivery
U.S. Mail X
Facsimile
Overnight Mail

John D. Harrington
White, Peterson, Pruss,
Morrow & Gigray, P.A.
104 9th Ave. S.
P. O. Box 247
Nampa, ID 83653-0247

Hand Delivery
U.S. Mail X
Facsimile
Overnight Mail


Richard C. Boardman

U.S. COURTS

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CLERK

Richard C. Boardman
PENLAND MUNTHERR BOARDMAN, CHARTERED
Jefferson Place
350 N. 9th Street, Suite 500
P.O. Box 199
Boise, Idaho 83701
Telephone: (208) 344-4566
File No. 30-3333.59

Attorneys for The Amalgamated Sugar Company

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In re:

HIPWELL, TERRY,

Debtor.

Case No. 96-02095

NOTICE OF HEARING ON
THE AMALGAMATED SUGAR
COMPANY'S MOTION FOR RELIEF
FROM THE AUTOMATIC STAY AND
FOR SET OFF

TO: THE ABOVE-NAMED DEBTOR, HIS COUNSEL, THE TRUSTEE AND THE
U.S. TRUSTEE:


PLEASE TAKE NOTICE that counsel for The Amalgamated Sugar Company
(TASCO) the above-entitled action will call up for hearing and argument its Motion for Relief
from Automatic Stay and for Set Off before the above Court in a courtroom of the U.S.
Bankruptcy Court, Federal Building, 550 W. Fort Street, 4th Floor, Boise, Idaho on the 16th day
of April, 1997, at the hour of 1:30 o'clock p.m., or soon thereafter as counsel can be heard.

EXHIBIT E

NOTICE OF HEARING ON THE AMALGAMATED SUGAR COMPANY'S MOTION
FOR RELIEF FROM AUTOMATIC STAY AND FOR SET OFF - 1

DATED this 26 day of March, 1997.

PENLAND MUNTHER BOARDMAN, CHARTERED


Richard C. Boardman, Of the Firm
Attorneys for The Amalgamated Sugar Company

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the ___ day of March, 1997, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the rules of procedure, to the following persons:

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United States Trustee
Ronald D. Schoen
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Richard C. Boardman